UNITED NATIONS **A**

General Assembly

Distr.
GENERAL

A/CN.9/SR.524
13 June 1994

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-seventh session

SUMMARY RECORD OF THE 524th MEETING

Held at Headquarters, New York,
on Thursday, 2 June 1994, at 10 a.m.

Chairman: Mr. MORAN (Spain)

CONTENTS

New international economic order: procurement (continued)

This record is subject to correction.

Corrections should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent within one week of the date of this document to the Chief, Official Records Editing Section, Office of Conference Services, room DC2-794, 2 United Nations Plaza.

Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

The meeting was called to order at 10.05 a.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued) (A/CN.9/392)

1. The CHAIRMAN said that the question had arisen of the exact title of the draft UNCITRAL Model Law on Procurement of Goods, Construction and Services, contained in the annex to the report of the Working Group on the New International Economic Order on the work of its seventeenth session (A/CN.9/392). He suggested that the final title should remain as set out in the annex, with the removal of the square brackets and the deletion of the word "draft".

2. Mr. TUVAYANOND (Thailand) said that, in view of the adoption of the UNCITRAL Model Law on Procurement of Goods and Construction, it seemed redundant to refer to goods and construction in the title of the draft Model Law now before the Commission. In fact the Commission was currently concerned only with services, the other elements having been dealt with in the earlier Model Law. Retention of the proposed title might mean that States would need to read both Model Laws in conjunction with each other.

3. Mr. CHATURVEDI (India) agreed that the Commission was dealing only with services, in which case the title of the draft Model Law should be amended accordingly. However, the Commission must guard against any tampering with the existing Model Law, which must be left well alone.

4. The CHAIRMAN noted that the text of the draft Model Law did not, in fact, deal only with services.

5. Mr. HUNJA (International Trade Law Branch) said that the Working Group had already considered the question of the title, as indicated in paragraphs 16 to 18 of its report. The understanding had been that the Commission would determine the best way to incorporate the question of services in a model law, probably in a consolidated text dealing with goods, construction and services. There would thus be two model laws, one on goods and construction, the other a consolidated text dealing with goods, construction and services. The only remaining issue was exactly how to entitle the consolidated text.

6. Mr. WESTPHAL (Germany) said that it might be simpler to entitle the draft law the UNCITRAL model law on procurement. The title of the first Model Law had been made restrictive since that text did not cover all aspects of procurement, but the text now before the Commission was broader. Nevertheless his delegation could accept the current wording of the title.

7. Mr. GRIFFITH (Observer for Australia) said that the draft Model Law should contain a note indicating that it was a consolidated text covering all three aspects and making clear the relationship between the two Model Laws. The note should be prominently placed on the first page.

8. Mr. KLEIN (Observer for the Inter-American Development Bank) said that either formulation of the title seemed acceptable. It had, however, been his

(Mr. Klein)

impression that the first Model Law would be superseded by the Model Law now before the Commission, which would be the only one remaining in effect.

9. Mr. CHOUKRI SBAI (Morocco) said that the question of the title was extremely important. The use of a short form would leave open the question of exactly what was covered, which was, in fact, goods, construction and services.

10. Mr. TUVAYANOND (Thailand) agreed that it was misleading to use a short form referring only to procurement, since it would not be clear what aspects were covered. Once the draft Model Law was adopted there would be two Model Laws - one on goods and construction, the other on goods, construction and services - which was potentially confusing since there would be two regimes, similar but not identical, for goods and construction. The use of an explanatory note indicating the relationship between the two Model Laws would provide a satisfactory solution.

11. Mr. CHATURVEDI (India) agreed with the Observer for the Inter-American Development Bank. Unless the Commission decided otherwise the adoption of the second Model Law would implicitly repeal the first Model Law, a matter which the Commission should consider further.

12. Mr. LEVY (Canada) said that it seemed that the full title would be necessary to avoid confusion, but he agreed with the Observer for Australia that a comprehensive explanatory note, prominently placed, was appropriate.

13. Mr. AL-NASSER (Saudi Arabia) said that there were two possibilities: that there would be two Model Laws, one dealing with goods and construction, the other with goods, construction and services; or that there would be a single, uniform or standardized model law on all three. Perhaps if the title reflected some such wording confusion would be avoided.

14. Mr. WALLACE (United States of America) said that the use of a full title, while ungainly, was less misleading. The suggestion made by the Observer for Australia was most helpful. Any such note might simply state that there was an existing law on goods and construction, but that there was now a consolidated text also covering services, and that the elements dealing with goods and construction were almost identical in the two Model Laws.

15. Mr. SHI Zhaoya (China) said that the current draft should refer to all three elements, since the current work of the Commission was to complement its earlier work by bringing services under a model law. It was important to clearly indicate the relationship between the two Model Laws. Accordingly, the current wording of the draft Model Law before the Commission should be retained, and, as suggested by other delegations, an explanatory note added.

16. Mr. GOH (Singapore) said that his delegation supported the suggestion that a note should be added to make it clear that the Commission was grafting provisions covering the procurement of services on to its earlier work.

17. Mr. KLEIN (Observer for the Inter-American Development Bank) asked why there should be two model laws, with the attendant risk of confusion.

18. Mr. HERMANN (Secretary of the Commission) said that the Commission could repeal the original Model Law if it chose, but had so far taken the view that some States would be interested only in goods and construction and would avail themselves of the first Model Law, while others would find it useful to use a model law also including the procurement of services. Even if there were a single text, some States would not be interested in the provisions relating to services, and a need would arise for advice on how to apply only some elements of the single text. In essence the two Model Laws met different needs, and where they dealt with the same subjects, they were identical in substantive terms.

19. Mr. CHATURVEDI (India) noted that the first Model Law had already been adopted by the General Assembly and that there would be a risk of further confusion if an attempt were made to repeal it. An explanatory note should suffice to make the situation clear.

20. The CHAIRMAN said that the Commission would thus adopt the title he had suggested earlier in the meeting, with the incorporation of an explanatory note.

Article 41 bis. Solicitation of proposals

21. The CHAIRMAN introduced article 41 bis and invited Commission members to comment on it.

22. Mr. WALLACE (United States of America) suggested that since a large part of article 41 bis dealt with the subject of notice, the word "notice" should appear somewhere in its title. Secondly, the whole of chapter IV bis should be drafted in accordance with the general principle that tendering was the preferred method for the procurement of goods and construction, and a competitive and transparent method, open to international bidders. Article 41 bis required notice to be published both domestically and internationally. His delegation believed that procuring entities' preference to deal with a limited number of suppliers or contractors with whom they were familiar was an erroneous policy of the past. He therefore questioned whether paragraph (3) of article 41 bis, which provided exceptions to that general principle, should be retained. Thirdly, paragraph (4) indicated that the necessary documents should be sent to any supplier or contractor that requested them as a result of notice. If paragraph (3) and the exceptions contained therein were to be deleted, paragraph (4) would have a purpose. However, if paragraph (3) was not deleted there would be cases where notice would not occur, and paragraph (4) did not indicate how the documents would reach the contractors or suppliers in question.

23. Mr. TUVAYANOND (Thailand) said that paragraph (3) of article 41 bis should be retained; however, it should be emphasized that the methods in question were to be used only on an exceptional basis and where they were really justified. His delegation believed that the requirement to publish a notice both domestically and internationally was detrimental to the third world countries which were the recipients of the goods, construction and services to be procured. The requirement to publish the notice in a newspaper of wide international circulation added to the costs incurred by the procuring entity and favoured foreign media over domestic media. Since it was also required that the notice should be published in a language customarily used in international

(Mr. Tuvayanond, Thailand)

trade, suppliers should endeavour to work with their embassies and consult local newspaper for notices.

24. Mr. JAMES (United Kingdom) said that although the methods set out in article 41 bis were the preferred methods for the procurement of services, they were not the only methods available in the Model Law. Thus, paragraph (3) was essential in that it reflected the grounds on which a procuring entity could engage in procurement by means of restricted tendering. He suggested that the provisions of paragraph (3) should be made subject to the same preconditions as in the case of restricted tendering, and that the words "subject to approval by a superior authority" should be inserted at the beginning of the paragraph. Furthermore, paragraph (3) (a) should indicate that the complex or specialized nature of the services meant that they were available only from a limited number of suppliers or contractors, as indicated in article 18, which dealt with conditions for use of restricted tendering. Moreover, it was dangerous to refer in paragraph (3) (a) to "suppliers or contractors that are known to the procuring entity", since doing so created an enormous loophole for the procuring entity; those words should therefore be deleted. Lastly, his delegation was in favour of deleting paragraph (3) (c).

25. Mr. WALSER (Observer for the World Bank) said that he strongly believed that paragraph (3) should be retained either as it stood or as amended by the representative of the United Kingdom. Governments should not be obliged to review dozens of complex proposals, especially when the projects concerned were relatively inexpensive. Procuring entities should make short lists of possible suppliers and contractors in an objective manner to ensure that the same firms were not used over and over again.

26. Mr. CHOUKRI SBAI (Morocco) proposed that the title of article 41 bis should be changed from "Solicitation of proposals" to "Invitation to submit proposals". He supported the proposal to delete subparagraph (3) (c).

27. Mr. LEVY (Canada) said that he supported the proposal of the representative of the United Kingdom to make the provisions of paragraph (3) subject to the approval of a higher authority and believed that paragraph (3) should be retained as amended. One of the objectives of the Model Law was to promote economy and efficiency in procurement. He opposed deleting the words "that are known to the procuring entity" from paragraph (3) (a), since to do so would put too great a burden on the procuring entity. Procuring entities should not be required to search the world for suppliers and contractors. It was the job of commercial agents and embassies to provide information to suppliers regarding which services were being sought.

28. Mr. CHATURVEDI (India) said that his delegation believed that paragraphs (2) and (3) of article 41 bis should be retained unchanged and opposed the deletion of subparagraph (3) (c). He proposed that a reference to the qualifications and experience of those who would be providing services should be included in paragraph (1).

29. Mr. LOBSIGER (Observer for Switzerland) said that he could not see how publishing a notice in a newspaper of wide international circulation would be

(Mr. Lobsiger, Observer, Switzerland)

disadvantageous. Paragraph (3) of article 41 bis was repetitive and the exceptions it contained should be deleted.

30. Mr. TUVAYANOND (Thailand) supported the proposal to make the provisions of paragraph (3) subject to the approval of a higher authority. However, he opposed the deletion of the words "that are known to the procuring entity" from paragraph (3) (a) as to do so could create a risk of infringement of the law. Lastly, he suggested that in paragraph (2) the term "wide circulation" sufficed and that the word "international" should be deleted.

31. Mr. FRIS (United States of America) supported the proposal to insert a reference to the approval of a higher authority in paragraph (3) of article 41 bis. He agreed that the words "that are known to the procuring entity" in subparagraph (3) (a) did create some problems. It was essential that the Model Law should not invite procuring entities to deal with only a small circle of suppliers and contractors. He suggested that a record-keeping requirement, similar to that set out in article 11, should be added to paragraph (3). Such a requirement could provide additional safeguards and might be useful to procuring entities in drawing up short lists of suppliers and contractors.

32. Mr. SHI Zhaoya (China) said that his delegation was in favour of retaining paragraph (3) and believed that the Model Law should take into account the special circumstances developing countries faced in the procurement of services. Paragraph (3) provided the necessary flexibility and made possible a wider application of the Model Law.

33. Although the text of chapter IV bis as a whole represented a considerable improvement over the previous draft, it was still unsatisfactory. His delegation would state its views on chapter IV bis as a whole at the appropriate time.

34. Mr. WESTPHAL (Germany) said that the draft Model Law proposed a complex structure for the procurement of services. Paragraphs (3) (a) and (b), which provided for restricted tendering and for exceptions to the provisions of paragraphs (1) and (2), should not be deleted. While international publication might indeed be the best means of ensuring transparency, the resulting proliferation of publications would create a number of practical problems. Provision must therefore be made for limiting the publication requirements. On the other hand, paragraph (3) (c) concerning the nature of the services to be procured should be deleted.

The meeting was suspended at 11.45 a.m. and resumed at 12.10 p.m.

35. Mr. WALSER (Observer for the World Bank) agreed that paragraph (3) (c) could be deleted. However, he did not support the proposal that the words "that are known to the procuring entity" should be deleted from paragraph (3) (a). The removal of that restriction would create difficulties for procurement authorities, which would be forced to choose the general approach in order to avoid breaking the law.

(Mr. Walser)

36. He also disagreed with the observer for Switzerland that paragraph (3) was repetitive. Paragraph (2) provided for an exception to the publication requirement where participation was limited solely to domestic suppliers or contractors or where, in view of the low value of the services to be procured, the procuring entity decided that only domestic suppliers or contractors were likely to be interested in submitting proposals. The provisions of paragraph (3) (b), on the other hand, were not limited to domestic suppliers. Paragraphs (3) (a) and (b) should therefore be retained in their current form.

37. Mr. TUVAYANOND (Thailand) said that the topic under discussion was of particular interest to Thailand. National legislators were generally concerned with economy and transparency. With respect to economy or cost-effectiveness, national legislators were more interested in reducing the cost to domestic taxpayers than in promoting the business of foreign news media. In addition, the cost of publishing each procurement notice in a publication of wide international circulation would be prohibitive. And if all the States of the international community published all their notices, the sheer volume of publications would be overwhelming. The method used by the Thai authorities was to publish invitations for proposals in a local English-language newspaper of wide circulation and to send circular notes to foreign embassies in Thailand. It would then be for the embassies to communicate the information to suppliers in the States which they represented.

38. Domestic transparency of the procurement process was more important than international transparency; in order to achieve such transparency, a national anti-corruption body had been established in Thailand to monitor the work of officials of the Thai Administration. The proposal by the representative of the United States that a record-keeping requirement should be instituted was a reasonable one and might provide an acceptable solution. On the other hand, his delegation could not support any superfluous and costly approach which would impose unfair economic burdens on national taxpayers.

39. Mr. CHOUKRI SBAI (Morocco) said that the deletion of the words "that are known to the procuring entity" from paragraph (3) (a) would create confusion. Those words should therefore be retained, especially since suppliers of services were generally known to procurement authorities.

40. Mr. JAMES (United Kingdom) noted that the use of certain expressions caused predictable reactions on the part of some members of the Commission. Use of the term "restricted tendering", for example, immediately elicited a negative reaction from certain members. He noted that the current debate was over the principles of transparency, international competition in public procurement, and openness, which had already been espoused by the Commission. The principle of international competition in public procurement, for example, had already been enshrined in the UNCITRAL Model Law on Procurement of Goods and Construction and was one of the Commission's most notable achievements in that field. Those principles should also be applicable to the model provisions on the procurement of services.

(Mr. James, United Kingdom)

41. He would accept the deletion of paragraph (3) (c) but recalled that, in its consideration of article 16, the Commission had agreed that the method of procurement provided for in paragraph (3) (c) would be the preferred method for the provision of services. Consequently, pending the Commission's decision on article 41 bis, he reserved the right to revisit that question at a later stage. Moreover, if paragraph (3) (c) were to be omitted, it would be necessary to provide for an approval mechanism. One approach could be to use the language of article 18, namely, that restricted tendering could be employed where the services, by reason of their highly complex or specialized nature, were available only from a limited number of suppliers or contractors. Those conditions could then be considered as an objective test. Such an approach might satisfy the concerns raised by the representative of Thailand, particularly if paragraph (3) (a) were restructured to read: "where the services to be procured are available only from a limited number of suppliers or contractors, provided that it solicits proposals from all those suppliers or contractors that are known to it". The procurement authority would thus be provided with a defence against charges of failure to apply the provisions of paragraphs (1) and (2).

42. Concerning the proposal by the representative of Thailand to omit from paragraph (2) the reference to publication in newspapers of international circulation, he said that that preferred method of procurement of services was meant to be as close to tendering as was practical. Moreover, that method had been agreed at the Commission's previous session and had been adopted by the General Assembly. In that connection, he referred to article 22 (2), which contained exactly the same provision as article 41 bis (2). If the method of procurement did not take account of those principles, his delegation would have second thoughts as to whether it was indeed the preferred method of procurement for services.

43. Mr. LOBSIGER (Observer for Switzerland) said that some of the exceptions set out in paragraph (3) were already covered in paragraph (2). He agreed with the Observer for the World Bank that the criterion of low value as expressed by paragraph (3) (b) could be used to justify non-publication at the international and national levels; that was not so in the case of paragraph (2). However, the scope of paragraph (3) (c) was too broad. Furthermore, paragraph (3) (a) was very vague and should be redrafted.

44. Mr. WALLACE (United States of America) said, with regard to the analysis of the representative of Thailand, that paragraph (3) was an exception to both paragraphs (2) and (1). He agreed with the United Kingdom representative's comments regarding international advertising and felt that paragraph (3) (c) was expendable. Paragraph (3) (b) would accommodate the representative of Thailand's concern over cost-effectiveness. As to the approval mechanism, it was an optional provision throughout the Model Law. He agreed with the United Kingdom representative that the expression "that are known to the procuring entity" was very ambiguous and suggested that it could be eliminated altogether. However, a record-keeping requirement would have to be incorporated somewhere in the text. The procurement of services was different from the procurement of

(Mr. Wallace, United States)

goods, and - as the preamble showed - the overall policy purposes did not exclude services.

45. Ms. SABO (Canada) said that her delegation generally supported the comments made by the observer for the World Bank, with the exception of his proposal to delete paragraph (3) (c). Where the suggestion regarding a chapeau for paragraph (3) was concerned, the Commission might consider adding a subparagraph to article 11 to ensure that a record was kept of any decision made with respect to the non-publication of a notice. Concerning paragraph (3) (a), she agreed with the United Kingdom delegation's suggestion to delete the words "that are known to the procuring entity".

46. Mr. AL-NASSER (Saudi Arabia) said that the publication of notices in newspapers with wide international circulation might have economic returns in that such notices would lead to lower prices through competition. While it was true that trade attachés were responsible for reporting on tendering notices published in the State where they were assigned, the routing of the information concerned from embassies to chambers of commerce and then to business circles was tortuous. Moreover, businessmen preferred to read international publications directly. He did not see the need for the addition of a reference to approval by a higher authority in paragraph (3). Paragraph (3) (a) was too restrictive and needed to be redrafted. With regard to paragraph (3) (c), if the intention was to promote economy and efficiency then the entire paragraph should be deleted. However, if the purpose of the paragraph was to address exceptions, then it should be redrafted and begin with the phrase "if there are circumstances necessitating speed or promptness".

47. Mr. TUVAYANOND (Thailand) said that his delegation could accept the idea of making the application of paragraph (3) subject to the approval of a higher authority. However, a record-keeping requirement should be incorporated into the paragraph so as to ensure transparency and provide an excellent deterrent to corruption. He was surprised that most delegations seemed concerned about the vagueness of the words "economy and efficiency" in paragraph (3) (c) although those very words appeared in the existing Model Law. Moreover, that paragraph had two very important safeguards reflected by the words "can only be promoted" and "to ensure effective competition". The requirement for local publication should at least be included in the first two paragraphs of chapter IV bis. He suggested that the phrase "that are known to" could be replaced by "that are widely known" as a compromise. Moreover, a way should be found to introduce the concept of due diligence into the text, as such a concept already existed in both internal and international law.

The meeting rose at 1.05 p.m.